APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND GRANT OF PANEL REHEARING DATED AND FILED JULY 1, 2003

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-30682

In Re: HORSESHOE ENTERTAINMENT,

Petitioner.

Petition for Writ of Mandamus to the United States District Court for the Middle District of Louisiana

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

DeMOSS, Circuit Judge:

Horseshoe Entertainment ("Horseshoe"), a Louisiana partnership having its domicile and principal place of business in Bossier City, Louisiana, petitions this Court to issue a Writ of Mandamus to reverse a decision of the United States District Court for the Middle District of Louisiana (the Middle District Court) in Civil Action No. 01-295 on its docket, denying a motion by Horseshoe to transfer the venue of a Title VII sex discrimination/ADA case to the Shreveport Division of the United States District Court for the Western District of Louisiana (the Shreveport Division Court) for the convenience of the parties and witnesses and in the interest of justice pursuant to 28 U.S.C. § 1404(a).

Appendix A

Caroline W. Rogers ("plaintiff") filed such suit against Horseshoe on April 17, 2001, in the Middle District Court alleging that she was subjected to discrimination and harassment while employed with Horseshoe in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"). On June 13, 2001, prior to filing any answer, Horseshoe filed its motion to transfer pursuant to § 1404(a) and such motion was timely and of sufficient content to prevent waiver of the venue issue when Horseshoe subsequently filed its answer in such proceeding. In its motion to transfer, Horseshoe asserts the following uncontested facts and grounds for its motion:

A. As reflected by plaintiff's sworn complaint:

1. Plaintiff is a resident of Caddo Parish, Louisiana, which is within the Shreveport Division of the Western District of Louisiana;

2. Plaintiff was employed by Horseshoe in Bossier City, Louisiana, which is also within the Shreveport Division of the Western District of Louisiana;

3. Plaintiff was subjected to certain acts of sexual harassment by other employees of Horseshoe and all of these acts occurred in Bossier City which is also within the Shreveport Division of the Western District of Louisiana;

4. Plaintiff suffers from a disability (diabetes) and Horseshoe failed to make reasonable accommodations for her disability and harassed her because of such disability; and all such conduct occurred in Bossier City or the greater

Shreveport area within the Shreveport Division of the Western District of Louisiana;

5. The alleged conduct of harassment and discrimination caused plaintiff to be constructively discharged from her employment on July 17, 2000, which occurred in Bossier City, Louisiana, within the Shreveport Division of the Western District of Louisiana; and

6. As a result of such alleged conduct, plaintiff sustained severe emotional distress and damages in the greater Shreveport area which is within the Shreveport Division of the Western District of Louisiana.

B. Almost all of the potential witnesses for Horseshoe reside in the areas of Bossier City and Shreveport, Louisiana, all within the Shreveport Division of the Western District Court.

C. Almost all of plaintiff's potential witnesses reside within the Bossier City or Shreveport area within the Shreveport Division of the Western District Court.

D. All employment records related to plaintiff's employment by Horseshoe are maintained in the offices of Horseshoe in Bossier City, Louisiana, within the Shreveport Division of the Western District.

E. But for the alleged conduct herein and the alleged constructive discharge, the plaintiff would have continued to work for Horseshoe in Bossier City, Louisiana, within the Shreveport Division of the Western District.

F. The distance between Baton Rouge, Louisiana, where the Middle District Court would conduct this litigation if it is not transferred, and the Shreveport/Bossier City area, where the witnesses and parties reside, is more than 200 miles; and is therefore beyond the 100 mile distance in which the automatic subpoena power of a district court can be used to compel attendance of witnesses.

JURISDICTIONAL QUESTION

As an initial point in her response filed with this Court to Horseshoe's petition for mandamus, the plaintiff questions whether this Court has jurisdiction under the All Writs Act (28 U.S.C. § 1651) to review the Middle District Court's decisions on the motion to transfer and contends that since Horseshoe did not even seek a certification from the Middle District Court pursuant to 28 U.S.C. § 1292, the order on the motion to transfer venue may not be reviewable at all. In essence, the plaintiff's contention is that the decision of the Middle District Court on the motion to transfer venue is not reviewable in any way by this Court. We disagree for two reasons. First of all, we operate on the presumption that if Congress wants to make a decision by a district court or a circuit court unreviewable it certainly knows how to do that. *See* 28 U.S.C. § 1447(d) which states that an order remanding a case to a state court from which it was removed "is not reviewable on appeal or otherwise; and see 28 U.S.C. 2244(b)(3)(E)." There is no such similar provision in the general venue statutes nor in the special venue statute applicable in this case.

Secondly, we think plaintiff misreads our Circuit's precedents. In ***Garner v. Wolfinbarger***, 433 F.2d 117, 120 (5th Cir. 1970), after first holding "that § 1292(b) review is inappropriate for challenges to a judge's discretion in granting or denying transfer under § 1404(a)," the panel went on to state:

> This Circuit has recognized the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders. ***Ex Parte Blaski***, 245 F.2d 737 (5th Cir.), *cert. denied*, 355 U.S. 872, 78 S. Ct. 122, 2 L. Ed. 2d 76 (1957); ***Ex Parte Pfizer & Co.***, 225 F.2d 720 (5th Cir. 1955); ***Atlantic Coastline RR v. Davis***, 185 F.2d 766 (5th Cir. 1950); *cf.* ***Ex Parte Deep Water Exploration Co.***, *supra.*

The petition for writ of mandamus in ***Garner*** was denied because there was no showing of "any failure by the district judge to correctly construe and apply the statute or to consider the relevant factors incident to ruling upon a motion to transfer or clear abuse of discretion on his part" which were the standards of review set in ***Pfizer***, *supra.* While the court in ***Garner*** commented that "in the voluminous litigation over transfer orders, only a few litigants have surmounted the formidable obstacles and secured the writ," we take that as a simple expression of the adage that "exceptions prove the rule." Neither ***Garner*** nor ***Pfizer*** have been overruled or criticized by this Court; and from these cases we draw the following standards (the ***Pfizer*** Standards) to be applied by

our Court in deciding the propriety or not of a district court's ruling on a motion to transfer under § 1404(a):

a.) Did the district court correctly construe and apply the relevant statutes;

b.) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and

c.) Did the district court abuse its discretion in deciding the motion to transfer.

There is no way that this Court can determine whether the ***Pfizer*** standards have been met except by reviewing carefully the circumstances presented to and the decision making process used by the Middle District Court; and for the reasons hereinafter set forth the errors of the Middle District Court are sufficient to satisfy the ***Pfizer*** standards and to justify the issuance of the writ of mandamus.

VENUE QUESTIONS

In addition to the general statutory provisions regarding venue set forth in Chapter 87 of Title 28 of the U.S. Code (28 U.S.C. § 1391, et seq.), Congress has adopted special venue provisions for the type of litigation involved in this case (claims under Title VII and the ADA) which state as follows:

(3) Each United States district court and each United States court of a place subject to the

> jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e-5(f)(3). We note that the last sentence of this special venue provision makes express cross-reference to §§ 1404 and 1406 of Title 28 indicating clearly Congress' intention that the provisions of §§ 1404 and 1406 would also be applicable in this case.

The provisions of 28 U.S.C. § 1404(a), upon which Horseshoe relies in its motion for transfer, state as follows:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Appendix A

The first issue that a district court must address in ruling on a motion to transfer under § 1404(a) is the question of whether the judicial district to which transfer is sought qualifies under the applicable venue statutes as a judicial district where the civil action "might have been brought." While the Middle District Court did not expressly address this issue, in our view there is no genuine controversy on this point. Plaintiff's suit might have been originally filed in the Shreveport Division of the Western District because (1) that is where "the unlawful employment practices are alleged to have been committed," (2) that is where "the employment records relevant to such practice are maintained and administered," (3) that is where "the aggrieved person would have worked but for the alleged unlawful employment practice," and (4) that is where "the respondent has his principal office." The critical issue in this case, therefore, becomes whether the "convenience of parties and witnesses, in the interest of justice" requires a district court to transfer this civil action to the Shreveport Division of the Western District.

For reasons not readily discernable from the record or the parties' briefing, the Middle District Court waited some 13 months until July 2002, to rule on Horseshoe's motion to transfer. As indicated earlier, Horseshoe filed its motion to transfer timely and before it filed its answer and in our view disposition of that motion should have taken a top priority in the handling of this case by the Middle District Court. When it finally did rule the Middle District Court summarized its findings and conclusions in the following paragraph:

> In considering the relevant factors, the Court finds that, since the plaintiff, the defendant and

> presumably the witnesses, all reside in Caddo Parish, the factors of availability and convenience of witnesses, availability and convenience of the parties, and place of alleged wrong militate in favor of the requested transfer. On the other hand, the factors of possibility of delay or prejudice if transfer is granted, the location of counsel,[8] and plaintiff's choice of forum seem to dictate that the requested transfer be denied.[9] Since the relevant factors appear to be evenly divided between the two alternatives, the Court finds that defendant has failed to carry its burden of establishing that justice weighs substantially in favor of the requested transfer of venue. Therefore, transfer of this litigation is not warranted and plaintiff's choice of forum will be honored.

In footnote 8, the Middle District Court pointed out that "Both parties are now represented by Baton Rouge counsel." In footnote 9, the Middle District Court indicated that it "Does not consider the factor regarding the location of books and records to be significant in the case because the implements of modern electronic imaging and document transfer and retrieval will greatly reduce, if not eliminate any inconvenience to the parties in this regard."

We think the District Court erred in concluding that the "relevant factors appear to be evenly divided between the two alternatives" and that in such circumstance

"the plaintiff's choice of forum will be honored," for the following reasons:

1. The factor of "location of counsel" is irrelevant and improper for consideration in determining the question of transfer of venue. Neither the plaintiff nor the Middle District Court favored us with a citation to any Supreme Court or Circuit Court decision recognizing the appropriateness of this factor nor have they cited any statutory text or any legislative history indicating the intention of Congress that such a factor be considered in deciding a motion to transfer. Furthermore, at the time Horseshoe filed its motion to transfer, it was represented by counsel in Shreveport and the premise of the Middle District Court's reliance on this factor was not correct. The delay by the Middle District Court in ruling on the motion to transfer required Horseshoe to engage counsel in Baton Rouge to represent it in the ongoing matters before the Middle District Court. Such "boot strapping" of even a relevant factor, much less an irrelevant factor, should not be encouraged; and we hold that the Middle District Court erred in considering this factor and giving it equivalent weight in its decision-making process.

2. We think the Middle District Court erred in not giving significance to "the factor regarding the location of books and records." Where relevant employment records are maintained and administered is expressly stated as a venue factor in the special venue statute and should be weighed by a District Court in evaluating the "interest of justice" aspect of the motion to transfer.

3. We think the Middle District Court erred in considering and giving weight to the factor of "possibility of delay or prejudice if transfer is granted." There is absolutely nothing in the pleadings, briefs, or records of this case from which we can determine what specifically the Middle District Court had in mind in using the vague generalities of "possibility of delay or prejudice" if transfer is granted. We recognize that in rare and special circumstances a factor of "delay" or of "prejudice" might be relevant in deciding the propriety of transfer, but only if such circumstances are established by clear and convincing evidence. No such evidence exists here in this case and we think the Middle District Court erred by considering and giving weight to the mere "possibility" of vague and indefinite circumstances.

4. Finally, we believe the Middle District Court erred in attributing decisive weight to the plaintiff's choice of forum. We believe that it is clear under Fifth Circuit precedent that the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative. ***Garner v. Wolfinbarger***, *supra* at 119. Obviously, to be considered at all, the plaintiff's choice of forum must be one which is permitted under the relevant venue statute. The plaintiff did not allege that "any unlawful employment practice" was committed in the Middle District of Louisiana; there is nothing in this record to indicate that relevant employment records were maintained or administered in the Middle District of Louisiana; there is nothing in this record to indicate that the plaintiff "would have worked" for Horseshoe in the Middle District of Louisiana but for the alleged unlawful employment practice

and there is nothing in this record to indicate that Horseshoe had any office of any kind in the Middle District of Louisiana.

The only basis upon which the Middle District Court could be a permitted venue under the Statute is the language which states:

> "such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed."

Assuming, without deciding, that the Middle District Court was an appropriate venue for Plaintiff's suit, we nevertheless conclude that the Middle District Court clearly erred and abused its discretion in denying Horseshoe's motion to transfer. Clearly the Middle District Court found that the criteria of "convenience of the parties and witnesses" as specified in § 1404(a) "militated" in favor of granting the transfer in this case. Likewise the Middle District Court found that the statutory venue factor of "district in which the unlawful employment practice is alleged to have occurred" militated in favor of transfer to the Western District. Only by considering factors which are not mentioned in the special venue statute (i.e. "possibility of delay or prejudice" and "the location of counsel") and by disregarding other factors that are expressly stated in the special venue statute (i.e. location of books and records; place where plaintiff would have worked but for the unlawful practice; and place where respondent has its principal place of business) was the Middle District Court able to create an evenly divided set of factors. If the two factors not mentioned in the venue statute are left

out of the analysis and the three factors expressly mentioned in the venue statute but not considered by the Middle District Court are added into the analysis, the factors favoring transfer substantially out weigh the single factor of the place where plaintiff chose to file the suit.

Accordingly, we grant Horseshoe's petition for a writ of mandamus, vacate the order of the Middle District Court denying Horseshoe's motion for transfer, and remand this case to the Middle District Court with instructions to enter an order transferring this case to the docket of the Shreveport Division of the Western District forthwith.

Appendix A

BENAVIDES, Circuit Judge, dissenting:

I would deny the writ. All necessary facts and factors were considered by the district court and the transfer statute was properly construed. Under these circumstances we should not even attempt to weigh and balance the factors which the district court was required to consider in reaching its decision. *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720 (5th Cir. 1955). While purporting to review the district court's decision for a clear abuse of discretion, the majority in fact conducts a *de novo* review. I fear that the decision will lead to the filing of unnecessary and unwholesome pretrial mandamus petitions by parties aggrieved by rulings on motions to transfer brought under 28 U.S.C.A. § 1404(a). Mandamus is an extraordinary writ and should not be a substitute for appeal. We have decided that the writ should issue "only in the absence of other adequate remedies when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990) (denying writ of mandamus) (citing *In re First South Savings Association*, 820 F.2d 700 (5th Cir. 1987); *United States v. Crawford Enterprises*, 754 F.2d 1272 (5th Cir. 1985)). This is not such a case.

For these reasons and for the reasons stated in my dissent to the panel's original opinion,[1] I would deny the writ.

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1. *In re Horseshoe Entertainment,* 305 F.3d 354, 360-62 (5th Cir. 2002) (Benavides, J., dissenting).

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-30682

In Re: HORSESHOE ENTERTAINMENT,

Petitioner.

Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion 9/10/02, 5 Cir., 305 F.3d 354)

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is GRANTED; and the panel opinion filed under date of September 10, 2002, and published at 305 F.3d 354, *et seq.* is hereby withdrawn and the new opinion filed contemporaneously with this Order is substituted for such prior opinion. The mandate on this substituted opinion shall issue forthwith. No member of the panel, nor judge in regular

active service of the Court having requested that the Court be polled on rehearing *en banc* (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

s/ Harold R. Demoss, Jr.
HAROLD R. DEMOSS, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX B — DISSENTING OPINION OF CIRCUIT JUDGE BENAVIDES DATED AND FILED SEPTEMBER 10, 2002

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-30682

In Re: HORSESHOE ENTERTAINMENT,

Petitioner.

Petition for Writ of Mandamus to the
United States District Court for the
Middle District of Louisiana

* * *

BENAVIDES, Circuit Judge, dissenting:

The standard for reviewing a district court's decision not to transfer venue is clear and well-settled: "[w]e review all questions concerning venue under the abuse of discretion standard." *United States v. Delgado-Nunez*, 295 F.3d 494, 496 (5th Cir. 2002) (quoting *United States v. Asibor*, 109 F.3d 1023, 1037 (5th Cir. 1997)). Of course, "abuse of discretion review of purely legal questions . . . is effectively de novo, because '[a] district court by definition abuses its discretion when it makes an error of law.'" *Delgado-Nunez*, 295 F.3d at 496 (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)). At issue here, however, is not a purely legal question, such as those contemplated in *Delgado-Nunez* and *Koon*. Rather, in deciding not to transfer the matter, the

district court considered and balanced many facts and factors. Accordingly, the district court's decision should not be reviewed *de novo*, but rather should stand barring an abuse of discretion.[1]

Furthermore, the writ of mandamus is an extraordinary, seldom-used remedy—not a substitute for appeal. Indeed, the writ should issue only "in the absence of other adequate remedies when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990) (citing *In re First South Savings Association*, 820 F.2d 700 (5th Cir. 1987); *United States v. Crawford Enterprises*, 754 F.2d 1272 (5th Cir. 1985)). Factors used to determine whether to issue the writ of mandamus "include whether the district court failed to construe and apply the statute correctly, whether the relevant factors incident to a motion to transfer were considered, and whether there was a clear abuse of discretion." *In re Cragar Industries, Inc.*, 706 F.2d 503, 504 (5th Cir. 1983) (citing *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir. 1981)). Although it was concluded in *Cragar* that the district court had in fact abused its discretion, no writ of mandamus was issued and the district court was instead encouraged to reconsider its decision. *See Cragar*, 706 F.2d at 506. Thus,

1. It is not clear whether the majority opinion adopts this abuse of discretion standard or a more scrutinizing review. Although the penultimate paragraph of the majority opinion concludes that the district court "clearly erred and abused its discretion in denying [the] . . . motion to transfer," most of the opinion addresses only whether the district court erred, not whether an error rose to the level of an abuse of discretion.

because a decision to transfer venue is governed by the abuse of discretion standard and the fact that the writ of mandamus is categorically disfavored as a remedy, the district court's decision not to transfer venue and to keep the matter in the Middle District of Louisiana must be respected in all but the most compelling circumstances.

To support its argument that the district court should have transferred the matter to the Western District of Louisiana, the majority opinion questions whether venue is proper in the Middle District. Yet, the plain meaning of the relevant special venue statute, codified at 42 U.S.C. § 2000e-5(f)(3), makes clear that venue is proper in *any* judicial district in any state in which the alleged discrimination occurred, which, here, includes the Middle District. *See* 42 U.S.C. § 2000e-5(f)(3) (noting that venue of Title VII suit lies in "any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice").[2] Thus, given the plain meaning of the special venue statute, venue is proper in any district in Louisiana, the state in which the alleged discrimination occurred. This sound result is neither novel nor unprecedented. *See, e.g., Richardson v. Alabama*

2. It has been established that this special venue statute supersedes any general venue provision. *See, e.g., Harding v. Williams Property Co.*, 1998 WL 637414, *2 n.5 (4th Cir. 1998) (unpublished disposition); *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 655 (11th Cir. 1993); *Johnson v. Payless Drug Stores Northwest, Inc.*, 950 F.2d 586 (9th Cir. 1991).

State Bd. of Educ., 935 F.2d 1240, 1248 n.11 (11th Cir. 1991) ("Since the alleged discrimination took place in Georgia, appellants were free to bring suit in any of the state's three federal judicial districts."); *see also Garus v. Rose Acre Farms, Inc.*, 839 F. Supp. 563 (N.D. Ind. 1993); *Gilbert v. General Elec. Co.*, 347 F. Supp. 1058 (E.D. Va. 1972). *Cf. Thurman v. Martin Marietta Data Systems*, 596 F. Supp. 367 (M.D. Pa. 1984).

In support of issuing the writ of mandamus, the majority opinion argues that this matter should be litigated in the Western District of Louisiana.[3] To be sure, this matter

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3. Courts traditionally have employed the following factors to determine whether to transfer venue:

(1) Plaintiff's choice of forum.

(2) The availability of compulsory process for the attendance of unwilling witnesses.

(3) The cost of obtaining the attendance of willing witnesses.

(4) The accessibility and location of sources of proof.

(5) The location of counsel.

(6) The relative congestion of the courts' dockets.

(7) Accessibility of the premises to jury view.

(8) Relation of the community in which courts and the jurors are required to serve to the occurrence giving rise to the suit.

(Cont'd)

could have been brought properly in the Western District. Supportive of this conclusion are the facts that the Western District is (1) the place of the alleged discriminatory conduct; (2) where the employment records relevant to the alleged discriminatory conduct are located; (3) the place of the plaintiff's residence; and (4) where most of the potential witnesses reside. Other factors, however, point toward keeping the matter in the Middle District. Most significantly, transferring venue would hinder the plaintiff's ability to choose a forum and may also result in prejudice and delay in this litigation,[4] as some motions in this matter have been disposed of and others are currently pending, including defendant's motion for summary judgment.[5]

(Cont'd)

> (9) The time, cost, and ease with which the trial can be conducted, and all other practical considerations relative to the trial.

See Fletcher v. Southern Pacific Transp. Co., 648 F. Supp. 1400, 1401 (E.D. Tex. 1986) (voluminous internal citations omitted).

4. Also perhaps relevant is the fact that the attorneys in this matter are located in the Middle District—not the Western District—of Louisiana. Although attorney location is never a strong factor in the calculus to transfer venue, it can bear some weight on the venue decision. *See Formaldehyde Institute, Inc. v. U.S. Consumer Product Safety Com'n*, 681 F.2d 255, 262 (5th Cir. 1982) (holding that attorney location was not "a significant basis for determining venue").

5. It seems strange that although defendant has filed in the Middle District a motion for summary judgment, which presumably relies upon various witness affidavits, defendant, in support of its request to transfer venue, hints that those same witnesses would be unavailable for trial unless the matter is transferred to the Western District. These positions appear to be mutually exclusive.

Appendix B

Believing that the district court's analysis and determination not to transfer venue clearly does not rise to the level of abuse of discretion, I would deny the extraordinary remedy of mandamus.

Accordingly, I dissent.

APPENDIX C — RULING ON MOTION TO TRANSFER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED AND FILED JULY 2, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 01-295-C

CAROLINE W. ROGERS

VERSUS

HORSESHOE ENTERTAINMENT

RULING ON MOTION TO TRANSFER

This matter is before the court on a Motion to Transfer filed by defendant, Horseshoe Entertainment. Plaintiff has filed opposition. Jurisdiction is allegedly based on federal question, 28 U.S.C. § 1331, under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act, 42 U.S.C. 12101, *et seq.*

BACKGROUND

On April 17, 2001, plaintiff, Carolyn W. Rogers, a resident of Caddo Parish, Louisiana, filed a complaint alleging that while employed by Horseshoe Entertainment at the establishment which it operated in Bossier City, Louisiana (also in Caddo Parish), plaintiff was sexually

harassed and also harassed with regard to her diabetes disability. Based on these factual allegations, plaintiff sets forth claims for violations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended by the Civil Rights Act of 1991; and the American Disabilities Act, 42 U.S.C. § 12101, *et seq.* Plaintiff alleges that defendants' actions created a hostile work environment and resulted in her subsequent resignation. Plaintiff seeks compensatory and punitive damages.

Defendant's Motion to Transfer contends that since plaintiff and defendant both reside in Caddo Parish, Louisiana and, since Caddo Parish, Louisiana is located in the Shreveport Division of the Western District of Louisiana, this action should be transferred to the Western District of Louisiana because it is allegedly a more convenient forum.

DISCUSSION

Defendant acknowledges that in plaintiff's complaint, she alleged venue pursuant to the more specific venue provision under Title VII and that plaintiff's choice of the Middle District of Louisiana appears to be a proper venue.[1] However, defendant argues that plaintiff's choice of the Middle District of Louisiana is not the final dispositive factor in the court's consideration as

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1. Pursuant to Title VII, 42 U.S.C. § 2000e-5(f)(3), provides, in pertinent part:

> Each United States District Court and each United States Court of a place subject to jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the state in which the unlawful employment practice is alleged to have been committed. . . .

to whether or not it is appropriate to transfer this matter to another district. Hence, defendant moves for a venue transfer, pursuant to 28 U.S.C. § 1404(a).

Section 1404(a) of Title 28 of the United States Code provides, as follows:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The trial court has discretion in determining whether to transfer a case pursuant to § 1404(a).[2] It is well settled that the movant bears the burden of showing why a transfer of venue under §1404(a) is warranted.[3] To prevail, the movant must show that justice weighs substantially in favor of transfer and the balance of convenience.[4] Therefore, in evaluating the merits of a § 1404(a) motion, the court must determine if a transfer would make it substantially easier for the parties to litigate the case.[5]

As directed by the Fifth Circuit, trial courts are to consider "all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and

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2. *See* **Jarvis Christian College v. Exxon Corp.**, 845 F.2d 523, 528 (5th Cir. 1988).

3. *See* **Gundle Lining Const. Corp. v. Fireman's Fund Ins. Co.**, 844 F.Supp. 1163, 1165 (S.D. Tex. 1994).

4. *See* **Id.**

5. *See* **Id.**

the interest of justice be better served by transfer to a different forum."[6] These factors are as follows: 1) the availability and convenience of witnesses; 2) the availability and convenience of the parties; 3) the place of the alleged wrong; 4) the location of books and records; 5) the possibility of delay or prejudice if transfer is granted; 6) the location of counsel; and 7) the plaintiffs choice of forum.[7]

In considering the relevant factors, the Court finds that, since the plaintiff, the defendant; and, presumably the witnesses, all reside in Caddo Parish, the factors of availability and convenience of witnesses, availability and convenience of the parties, and place of alleged wrong militate in favor of the requested transfer. On the other hand, the factors of possibility of delay or prejudice if transfer is granted, the location of counsel[8], and plaintiff's choice of forum seem to dictate that the requested transfer be denied.[9]

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6. **Peteet v. Dow Chem. Co.**, 868 F.2d 1428, 1436 (5th Cir.), *cert. denied*, 493 U.S. 935, 110 S.Ct. 328, 107 L.Ed.2d 318 (1989) (citation omitted).

7. *See* e.g. **EEOC v. Mustang Mobile Homes, Inc.**, 88 F.Supp.2d 722, 725 (W.D. Tex. 1999); **Hall v. Environmental Chem. Co.**, 64 F.Supp.2d 638, 644 (S.D. Tex. 1999).

8. Subsequent to the filing of the Motion to Transfer, defendants replaced their original attorney with local (Baton Rouge) counsel. Therefore both parties are now represented by Baton Rouge counsel.

9. The Court does not consider the factor regarding the location of books and records to be significant in this case because the implements of modem electronic imaging and document transfer and retrieval will greatly reduce, if not eliminate, any inconvenience to the parties in this regard.

Since the relevant factors appear to be evenly divided between the two alternatives, the Court finds that defendant has failed to carry its burden of establishing that justice weighs substantially in favor of the requested transfer of venue. Therefore, transfer of this litigation is not warranted and plaintiff's choice of forum will be honored.

Accordingly,

IT IS ORDERED that defendant's, Horseshoe Entertainment, Motion to Transfer (Doc. No. 5) is **DENIED**.

Baton Rouge, Louisiana, this 2nd day of July, 2002.

s/ Ralph E. Tyson
RALPH E. TYSON, JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA